BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN CLARK, Claimant, v. IDAHO TRUSS, Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 00-029626** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed October 19, 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise, Idaho, on March 5, 2004. Richard S. Owen represented Claimant. Paul S. Penland represented Employer and Surety. State of Idaho, Industrial Special Indemnity Fund ("ISIF"), represented by Kenneth L. Mallea, settled its dispute with Claimant less than 10 days before the hearing. Consequently, throughout the remainder of this decision, "Defendants" refers only to Employer and Surety. The record was held open for a limited basis as described below. After hearing, Defendants filed certain written motions described below. The parties took posthearing depositions and submitted briefs. The case came under advisement on June 21, 2004, and is ready for decision.

ISSUES

The parties agreed a compensable accident occurred and that Claimant is totally and permanently disabled. After notice and agreement by the parties at hearing, the issues were identified as:

1. Whether the condition for which Claimant seeks benefits is caused by the alleged industrial accident; and

2. Whether and to what extent Defendants are liable for the following benefits:

   (a) Permanent partial impairment (PPI);
   (b) Permanent partial disability (PPD) under the Carey formula; and
   (c) Medical care.

The above-described issues include questions about preexisting impairments and disability for purposes of applying the Carey formula. Additional issues included in the Notice of Hearing became moot with the settlement between Claimant and ISIF.

CONTENTIONS OF THE PARTIES

Claimant contends certain prior injuries and conditions do not constitute a permanent physical impairment for purposes of assessing liability under Idaho Code § 72-332. Certain prior injuries and conditions do not qualify under Idaho Code § 72-332 to reduce Defendants' liability. Also, Claimant needs further medical care for his low back.

Defendants contend prior settlement agreements as well as the recent agreement between Claimant and ISIF preclude Claimant from arguing an inconsistent position. Claimant's prior injuries and conditions, including diagnosed conditions of borderline intellectual functioning and learning disorder, constitute preexisting physical impairments which qualify to reduce Defendants' liability, applying the Carey formula under Idaho Code § 72-332.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony by Claimant and Employer's managers Allen Leininger and Carol Hudson;

2. Claimant's Exhibits 1 through 20;

3. Defendant's Exhibits A through Z and AA;

4. The posthearing deposition testimony of Herbert Oliver, D.C., neuropsychologist Craig W. Beaver, Ph.D., vocational rehabilitation consultant William C. Jordan, including the exhibits thereto. All objections in post-hearing depositions are overruled except those found in Dr. Oliver's deposition at pages 31 and 61-65, which are sustained; and

5. The Stipulation for Entry of Award between Claimant and ISIF ("Stipulation").

In addition to the usual posthearing depositions, the record was held open for receipt of the Stipulation after it had been signed by Claimant and ISIF. The Stipulation is admitted.

Also, the record was held open for the potential admission of certain documents which might support a specific accident date and of the reverse side of the Form 1 (Exhibit K). The admission of these documents was dependent upon whether the parties could agree that these should be admitted. Ultimately, the parties did not agree.

Defendants submitted the documents together with an affidavit by Carol Hudson. The documents suggest more than one date as the possible date of the accident. Ms. Hudson's affidavit admits the precise date cannot be determined from the documents. These documents were in Defendants' control throughout discovery. Almost five months before the hearing, in Claimant's deposition, he identified the invoice numbers he thought might verify the accident date. Defendants failed to produce these documents in a timely manner. These documents are not admitted as evidence.

Similarly, writing on the reverse side of Exhibit K was in Defendants' control throughout discovery. Defendants failed to produce this document in a timely manner. This document is not admitted as evidence.

After having fully considered the above evidence, in conjunction with the Referee's Findings of Fact, Conclusions of Law, and Recommendation, the Commission hereby issues its decision in this matter.

MOTIONS AND PROCEDURAL RULINGS

Defendants moved the Commission to "deem admitted" certain alleged facts based upon agreements involving prior injuries which had been approved by the Commission years earlier. Defendants also moved the Commission to "deem admitted" Claimant's response to an interrogatory in which he asserted he "takes no position" about apportionment of liability between Defendants and ISIF. In response, Claimant similarly moved to "deem admitted" all of Defendants discovery responses. Requests for admission are expressly excluded from available discovery methods by the Judicial Rules of Practice and Procedure (J.R.P.), Rule 7(B). All such motions are DENIED. All evidence of record will be appropriately weighed and considered.

Defendants moved that collateral estoppel or similar doctrine should be applied to preclude Claimant from alleging Defendants were liable for any benefits inconsistent with the agreement between Claimant and ISIF as set forth in the Stipulation. Defendants are not a party to the Stipulation. Where possible, settlements are encouraged by the Commission. Defendants' motion is DENIED.

Defendants moved to amend the Answer to specify an accident date later than May 29, 2000. Defendants also moved to treat Ms. Hudson's affidavit and the invoice documents as an offer of proof. Defendants' failure to raise issues and discover documents in their possession in

a timely manner – particularly where Claimant specifically identified the invoice numbers almost five months before hearing – does not require the Commission to allow belated attempts to augment the record. Moreover, the proposed evidence does not unequivocally indicate the accident occurred on a specific date. Defendants' motions are DENIED.

Finally, on June 8, 2004, Defendants filed a document entitled "Renewed Motions Relating to Discovery Issues, in Limine, Withdrawal of Objection and Motion to Deem Issue Waived and Brief." This document constitutes a thinly-disguised reply brief by Defendants. A reply brief by Defendants is unauthorized by J.R.P. It is STRICKEN.

FINDINGS OF FACT

Introductory Facts

1. Claimant began working for Employer in 1992. In 2000, he injured his back in an accident at work. He was lifting roof trusses onto a truck. He is totally and permanently disabled.

2. The Form 1 for this accident was not completed until September 12, 2000. The accident date – reported as May 27, 2000, on the Form 1 – was chosen "arbitrarily" by Employer. Claimant believes the accident actually occurred in late June, late July, or August. Claimant's testimony about events related to giving notice and completing the Form 1 was inconsistent with other testimony and documentary evidence. For purposes of determining what medical care was given for a preexisting condition, ironically, it would be to Claimant's advantage to accept the date stated by Employer and to Employer's advantage to accept any, especially the last, of the dates stated by Claimant.

3. Claimant was 56 years old on all possible accident dates. He is missing some teeth, but these are not so obvious as to constitute disfiguration for purposes of assessing

disability nor shown to meet statutory criteria for purposes of apportioning liability under Idaho Code § 72-332 and the Carey formula.

4. On October 17, 2000, Claimant underwent low back surgery. When finally released for work after surgery, Claimant was unable to tolerate it. Employer attempted to accommodate Claimant by changing his duties. Historically, Employer had modified Claimant's duties to accommodate his recovery from other injuries. After a miscommunication in which Claimant believed he should wait to be called to return to work, Claimant was terminated in March 2002.

5. Since terminated from Employer, Claimant has not worked. He tried caulking and painting one bathroom for a friend, but was unable to finish it.

6. Claimant attended special education classes in elementary school. He only sporadically attended school and stopped formal education altogether about age 14.

7. Claimant does not read or write well. For all but the simplest of words, he relies upon others to help him with the written word. For example, if he needs to find a street name or a grocery item, someone will write a key word on paper. Claimant will match the letters to find the corresponding word on a street sign or a grocery label.

Past Injuries and Claims

8. Claimant injured his back in 1978. He has experienced occasional back pain since. He occasionally sought medical care for it. Sometimes activities caused bouts of pain or increased his existing pain. Nevertheless, except for a period of incarceration, Claimant worked at jobs which often involved heavy labor. Claimant believes his back problems did not impact his ability to work until after the accident in 2000. He worked at various heavy mining and other activities.

9. Claimant injured his back in 1981. A 1983 Compensation Agreement settled the claim with an award of 6% "disability and/or impairment." J. T. Giesen, M.D., rated Claimant as suffering a 6% "disability." His notes identify the 1978 date, not the 1981 date, as the date of injury.

10. On April 16, 1996, Claimant claimed in a Form 1 that his back "popped out." The record does not show he was awarded any PPI for this Claim.

11. A 1996 Lump Sum Agreement settled a 1993 carpal tunnel syndrome claim and other claims. It calculated 6% PPI and an additional 5% PPD. In late 1995, George Nicola, M.D., rated Claimant's PPI at 10% of the upper extremity. This translated to the 6% PPI set forth in the 1996 Lump Sum Agreement.

12. A 1999 Lump Sum Agreement and Order of Discharge settled a 1996 claim for a ruptured right biceps tendon. It calculated a 4.4% PPI and an additional 16% PPD. In 1997, Michael Weiss, M.D., reported Claimant's biceps tendon was not yet stable. Nevertheless, he rated Claimant at 6% PPI, and opined some should be apportioned to Claimant's old carpal tunnel syndrome.

13. Claimant filed a claim after a March 24, 1998, injury to his right upper extremity. He reported it as a muscle strain. In December 1998, Thomas E. Goodwin, M.D., evaluated a functional capacities evaluation ("FCE") and imposed specific permanent restrictions in the light-to-medium work range for Claimant when using his right hand and arm. The record is unclear whether or to what extent these restrictions were considered or incorporated in the 1999 Lump Sum agreement and Order of Discharge.

14. Claimant suffered several other injuries over the years. No contemporaneous medical opinion or settlement agreement rated Claimant or calculated an award for additional

PPI or PPD beyond that discussed above.

15. Regarding Claimant's 2000 low back injury, although the doctors are not unanimous, they gave reasonably consistent ratings. Their opinions well support a finding of 12% PPI. The question of whether this rating should be apportioned – as well as whether PPI should be assigned to other conditions for which no contemporaneous ratings were assigned – will be discussed later.

Prior Medical Care

16. In 1978, E. E. Gnaedinger, M.D., diagnosed an upper back sprain. Throughout his treatment, he noted no permanent injury or restrictions.

17. In 1980, Thomas Prenger, M.D., recorded Claimant jammed his left thumb. Also, in 1989, Dr. Prenger treated a right elbow contusion. No permanent injury or restrictions were noted for either accident.

18. In 1983, Dr. Prenger treated Claimant's wrist sprain and noted no permanent injury or restrictions.

19. Also in 1983, Dr. Giesen, opined, "I do think [Claimant] has some permanent problem with his back." He so opined despite a CT scan which showed no definite abnormality. Although this opinion was the major basis for a 1983 settlement agreement for a 1981 accident, Dr. Giesen identified Claimant's 1978 accident as the date of injury. Dr. Giesen recorded Claimant suffered a 6% "disability," but he did not specify any physical restrictions.

20. In 1983 and 1984, Daniel W. Larson, D.C., treated Claimant. In February 1983, Dr. Larson noted Claimant requested a disability rating. Dr. Larson recorded, "My opinion is that the disability rating would be rather small." He did not actually record a rating. In May 1983, Dr. Larson noted Claimant strained his back at work one week prior. He diagnosed an

acute phase of chronic lumbosacral strain/sprain and subluxation of L1-L5 related to the 1981 accident. In February 1984, Dr. Larson warned Claimant to "use caution in lifting and bending." He did not recommend any specific permanent restrictions. Claimant later complained of some thoracic and upper lumbar symptoms. Finally, in August 1985, Dr. Larson noted that Claimant's back "pain was persistent but non disabling."

21. In 1984 and 1985, Dr. Prenger reviewed a left shoulder X-ray, and treated Claimant's TMJ syndrome, right shoulder tendonitis, and broken right little finger. No permanent injury or restrictions were noted to result from any of these conditions.

22. In 1986, Claimant's back began showing degenerative changes. Dr. Prenger diagnosed arthritic changes at the facet joints of L5-S1. He related a lumbar spine strain to the 1981 accident. X-rays in March 1986 showed minimal degenerative osteoarthritic changes at L5-S1 without spondylolisthesis.

23. In April 1986, Warren J. Adams, M.D., diagnosed right facet syndrome as existing since the 1981 accident. In 1987, Dr. Adams noted that after being off work 1½ years, Claimant began experiencing low back pain without any associated new injury. Also in 1987, Dr. Prenger noted a recurrence of back pain.

24. In 1990, a lumbar X-ray showed arthritis at L5-S1 and scoliosis.

25. While incarcerated, Claimant filed several notes requesting medical care. Some of these addressed back pain.

26. In 1993, Claimant developed carpal tunnel syndrome. Treated by Samuel S. Johnson, M.D., and George Nicola, M.D., Claimant underwent right wrist surgery in late 1993. Dr. Nicola's notes showed that he expected Claimant to return to work without impairment. Lingering symptoms eventually led Dr. Nicola to rate Claimant at 10% PPI of the

upper extremity. An EMG and nerve conduction velocity study taken in November 1995 showed nerve slowing, although it was worse in Claimant's asymptomatic left hand than in his right. Employer accommodated Claimant's return to work by changing Claimant's job duties. Although Claimant believes his right hand "never did feel right" after surgery, he was able to do everything he had done before his carpal tunnel surgery.

27. In November 1996, Claimant ruptured his right biceps tendon. Surgical repair occurred the next day. By June 1997, treating physician Kyle L. Palmer, M.D., released Claimant to "full activity as tolerated." He did not express any specific restrictions. However, Claimant continued to complain of symptoms. In June 1997, Dr. Weiss reported Claimant's bicep was not stable but rated him anyway at 6% PPI, some of which, he opined, should be apportioned to the carpal tunnel condition. Again Employer accommodated Claimant's return to work temporarily. After it healed, Claimant believes that his right arm strength was only about 60 to 70%. Claimant testified inconsistently that it did not impact his ability to perform his job duties and that he was unable to lift heavy objects with his right arm. Employer accommodated Claimant's return to work by altering Claimant's job duties. Claimant eventually resumed his former job duties "after [his] arm got stronger" and did occasionally build trusses as before the biceps surgery, but mostly worked at the other job duties for Employer.

28. On March 24, 1998, Claimant claimed an injury to his right upper extremity. In June 1998, Michael T. Phillips, M.D., evaluated Claimant and opined Claimant needed no restrictions as a result of the March 24, 1998 injury. Claimant continued to complain of symptoms. Temporary restrictions were imposed, and Employer accommodated Claimant's return to work.

29. A November 1999 X-ray of Claimant's hands showed no arthritis, but

Steven B. Kao, M.D., noted sclerosis at the bases of the proximal phalanges in digits two through five in both hands and diagnosed osteoarthritis. Then in April 2000, Dr. Kao noted that X-rays of Claimant's hands were unremarkable.

30. Claimant occasionally sought chiropractic treatment for his back. Records of Keith McKim, D.C., show Claimant made 13 visits in April through June 1996, 4 visits in November and December 1997, 7 visits in 1998, 10 visits in 1999, and 3 visits in January 2000.

Medical Records: Summer of 2000

31. Claimant visited Dr. McKim seven times in May through June 2000. Specifically, those visits occurred on May 2, 4, 10, and 31, and June 1, 8 and 29.

32. On July 20, 2000, Claimant visited the office of chiropractor Herbert Oliver, D.C., and saw Martha Jenkins, D.C. Claimant reported having symptoms for six to seven months with a flare-up for a "couple" of days previous without any precipitating activity "other than work activity." Dr. Jenkins suspected a disc lesion. From July 21 through September 12, 2000, Claimant visited 19 times for treatment. On August 11, 2000, Dr. Oliver noted, "I am uncertain regarding industrial causation at this time. However, [the] description of his employment sounds quite strenuous."

Post-Accident Medical Care

33. Claimant visited Dr. Oliver nine times between September 13 and October 4, 2000.

34. Diagnostic studies were conducted on September 5, 2000. A lumbar MRI showed degenerative changes and disc bulges, as well as a probable cyst at L5. X-rays showed mild degenerative changes and no malalignment of Claimant's lumbar spine.

35. On September 11, 2000, Dr. Oliver noted:

> [H]e reports that he has sustained numerous injuries during his employment with this company. Mr. Clark cites some specific industrial injuries, witnessed, but not pursue[d] on an industrial basis. He is mostly illiterate and states that he did not report many of these incidents for fear of losing his employment and not being able to find other gainful employment. In my opinion, his condition is most likely a result of repetitive and continuous trauma, which eventually weakened the intervertebral disc at L-4/5. It seems doubtful that his employer hired him with a right sided disc protrusion eight years ago. Considering the strenuous nature of his employment, it seems a medical probability that his condition has an industrial relationship is [sic] most likely arising out of his employment.

36. On September 13, 2000, Paul J. Montalbano, M.D., diagnosed a right L4-5 disc herniation and spondylitic disease. He indicated surgery was a possibility but agreed with Claimant that conservative measures should be tried first.

37. On September 19, 2000, Dr. Kao diagnosed low back pain with osteoarthritis and probable radiculopathy.

38. On October 5, 2000, D. Peter Reedy, M.D., noted Claimant reported a flare-up of symptoms in July. He expressed uncertainty about pre-existing symptoms but believed Claimant's right leg pain indicated an acute injury.

39. On October 17, 2000, Dr. Reedy performed surgery. He removed part of a disc and a cyst and opened the area with a hemilaminectomy. In his presurgical notes, Dr. Reedy recorded, "He does not want to wait any longer. He is anxious to get it fixed so he can get well and get back to work." Claimant testified surgery relieved his right leg symptoms, but only marginally helped his back pain.

40. By January 16, 2001, Claimant's recovery had progressed and Kevin R. Krafft, M.D., recommended a work hardening program. Claimant believes work hardening made his condition worse.

41. Also on January 16, 2001, in a visit to Robert F. Calhoun, Ph.D., Claimant

reported his injury date as May 29, 2000, involving an accident while moving trusses.

42. A February 12, 2001 lumbar MRI showed a small right L4-5 disc fragment had migrated just above the disc space level and showed slight anterolisthesis of L5 on S1.

43. On February 28, 2001, Dr. Calhoun performed a psychiatric consultation.

44. Claimant visited Dr. Oliver on March 2 and April 23, 2001.

45. On March 5, 2001, physical therapist Peggy S. Bailey reported on Claimant's "fluctuating motivation." This was his last visit to that office.

46. Also on March 5, 2001, Dr. Calhoun performed a psychiatric evaluation.

47. A March 12, 2001 FCE under Key protocols was considered valid.

48. On March 23, 2001, Dr. Krafft released Claimant to return to work with restrictions.

49. On April 20, 2001, Al H. Kuykendall, M.D., performed an evaluation at the request of Defendants. He noted confusion about the date of the accident. Claimant stated the accident occurred on July 16 or 17, not May 29, 2000, as reported on the Form 1. Dr. Kuykendall opined Claimant was medically stable and rated his low back at 10% PPI. He weighed-in on an ongoing dispute about whether Surety should authorize a myelogram, calling it "not clinically necessary" and noting it would serve only to relieve Claimant's anxiety. At this time, Claimant believed a loose disc fragment was causing his continuing symptoms.

50. On April 26, 2001, Dr. Reedy asserted a myelogram was "necessary" to be certain the disc fragment shown on the last MRI was not clinically significant. Dr. Reedy elaborated, "I do not believe it is significant, but I need to prove it so that I can release him from my care."

51. The belatedly-authorized lumbar myelogram was performed June 20, 2001. It showed focal underfilling and truncation of the right L5 nerve root sleeve at the axilla at the L4-5

level. Lumbar X-rays taken that day showed minimal anterolisthesis of L5 on S1 which reduced with extension, as well as degenerative changes. A lumbar CT taken that day noted, "The appearance of the lumbar myelogram cannot be accounted for on the CT scan and may reflect focal enlargement of the nerve root as might be seen with focal arachnoiditis. Once again, no CT findings to suggest this diagnosis."

52. On June 25 and 26, 2001, Dr. Reedy opined the diagnostic studies showed additional surgery would not likely help Claimant. He approved a job site evaluation, released Claimant to return to work, and answered questions in which he agreed with Dr. Moore's recommended restrictions.

53. On July 30, 2001, Dr. Oliver evaluated Claimant, opined he was not stable and recommended resumption of total temporary disability. From July 27 through September 28, 2001, Claimant visited Dr. Oliver for treatment 12 times. On September 28, 2001, Dr. Oliver noted, "Absent additional diagnostic workup, his condition should be considered permanent and stable. I do not anticipate further significant improvement in his conditions."

54. On August 30, 2001, Monte Moore, M.D., diagnosed chronic pain syndrome and recommended a return to work with specific restrictions. On November 9, 2001, Dr. Krafft opined his agreement with the recommended restrictions.

55. An October 4, 2001, addendum to a job site evaluation noted that Claimant's "reading level has not been a problem."

56. From October 5 through November 30, 2001, Claimant visited Dr. Oliver eight times for treatment. On December 3, 2001, Dr. Oliver opined, "I believe Mr. Clark has obtained a **permanent and stable** status in which further subjective or clinical improvement appears unlikely. . . . In my opinion, this individual is precluded from heavy work activity and should be

limited to semi-sedentary employment activities" (his emphasis). He agreed with Dr. Moore's recommended restrictions. He opined no apportionment was appropriate.

57. Claimant was evaluated at Defendants' request on December 11, 2001. Drs. Kuykendall, Weiss, and David Price, D.C., performed the evaluation. Dr. Oliver observed on Claimant's behalf. The panel doctors noted Claimant reported the accident date as July 27, 2000, but was unsure upon closer questioning. They noted his history of chronic recurrent back pain since at least 1978. They diagnosed chronic back pain and degenerative disc disease. They opined,

> [I]t seems more likely than not that his back symptoms represent a chronic progression of his underlying degenerative disease including a L4 synovial cyst which combined with bulging discs, osteophytes and other degenerative changes caused foraminal and central stenosis and L5 nerve root irritation.

They considered the results of the CT scan of June 20, 2001, were possibly a complication of surgery which contributed to Claimant's symptoms. They rated Claimant's low back at 12% PPI and assigned half of that, 6%, to preexisting conditions. They considered PPI of other body parts to be unrelated and insufficient to significantly impact their PPI opinions. They opined Claimant should have been restricted from heavy work before his accident. They opined any future back treatment would be unrelated to the accident. They recommended specific restrictions.

58. Dr. Oliver criticized the panel's evaluation:

> These panel physicians are now opining that there should have been a retroactive prophylactic restriction and that Mr. Clark injured himself by exceeding those retroactive limitations. This speculative medical opinion appears based upon fiction and tries to create a pre-existing physical disability that was otherwise non-existent. There is no documentation in the medical records indicating pre-existing work restrictions, prior disability or limitation to medium work.

In deposition, Dr. Oliver further criticized the panel for not using inclinometers when assessing range of motion for purposes of evaluating PPI. He opined that the apportionment recommended

by the panel physicians was inconsistent with Claimant's work history.

59. Dr. Weiss issued a written rebuttal to Dr. Oliver's critique. He defended the panel physicians' procedure and judgment. On July 29, 2002, Dr. Moore expressed concurrence with the 12% PPI with 6% apportioned to Claimant's preexisting back condition. He agreed that Claimant's functional limitations would have been the same before and after the accident, except for the new L5 nerve root irritation Claimant exhibited. He agreed Claimant should have been limited to medium work before the accident and that Claimant's need for future back treatment was unrelated to the accident. In deposition, Dr. Oliver opined Claimant needed future medical care as a result of the accident.

60. In about one year, from December 3, 2001, through November 13, 2002, Claimant visited Dr. Oliver for treatment 41 times. In the following nine months, December 11, 2002, through September 26, 2003, Dr. Oliver saw Claimant only 12 times.

61. In February 2002, William Jordan performed a disability evaluation at Defendants' request. However, on February 28, 2004, he opined Claimant was totally and permanently disabled. He opined Claimant's restrictions and capacities were similar before and after the May 29, 2000, accident. He opined Claimant suffered 57.4% permanent disability before the accident and 12% permanent disability after, with an additional unknown amount of permanent disability post-accident for unrelated back difficulties. In deposition, he opined he believed Claimant's mental condition was a hindrance to market access and job performance despite his earlier-expressed opinion that it was not. He opined the preexisting conditions combined to create Claimant's total and permanent disability.

62. Mary Barros-Bailey performed a disability evaluation at Claimant's request on June 28, 2002. She opined retraining would not likely be successful given Claimant's academic

history. She opined the restrictions identified in the Key FCE result in a 37% loss of market access and a 22% wage loss. Based upon Dr. Moore's restrictions, Claimant suffered a 68.5% loss of market access and a 23% wage loss and, considering nonmedical factors, she opined Claimant suffered permanent disability of 45 to 50%. Based upon the panel physicians' opinions of apportionment, Claimant suffered an 11% loss of market access and a 29% wage loss, which with nonmedical factors included would yield a 20 to 25% permanent disability. Assuming Dr. Reedy's opinion that Claimant could return to work without restrictions, Claimant suffered no permanent disability. She later amended these opinions by opining that considering a best-quarter earnings analysis, disability should be four to seven percent higher under each set of assumptions.

63. On November 6, 2002, Claimant visited St. Alphonsus' emergency room with symptoms which were diagnosed as an acute exacerbation of his chronic back pain with signs suggestive of radiculopathy.

64. On November 11, 2002, Claimant visited Dr. Moore for the first time since March 2002. Dr. Moore noted Claimant had new left leg pain, but otherwise symptoms were as before. Two days later, an MRI showed a disc fragment had migrated to compress the S1 nerve root. The degenerative changes were also noted. On December 5, 2002, Dr. Moore noted the results of the MRI and opined, "I think he is permanently disabled."

65. On March 11, 2003, Dr. Moore diagnosed "chronic pain syndrome associated with advanced degenerative lumbar disc disease. . . . He is a candidate for a lumbar fusion, but these symptoms may also respond to conservative management.

66. In October 2003, Craig W. Beaver, Ph.D., performed a neuropsychological evaluation at the request of Defendants. Dr. Beaver noted Claimant reported the injury date

was actually August 2000, not May. Dr. Beaver diagnosed and opined. He found Claimant at borderline intellectual functioning due to multiple factors, maybe fetal alcohol syndrome, maybe a drowning incident at age 4, maybe mild head injuries from earlier fights and skull fractures. Dr. Beaver noted that Claimant reported he did not complete high school and that his mother often kept him home from school to baby-sit his little sister, but did not express any potential linkage between that and Claimant's mental conditions. He opined, "[I]t is my view, on a more-probable-than-not basis, that his limited intellectual functioning is a reflection of neuro-anatomical abnormalities." He opined a "multitude of factors" were causative and which affected Claimant's functioning. He opined Claimant suffered 5% PPI for intellectual function and another 15% PPI for significant learning disorders.

67. In deposition, Dr. Beaver explained that his reference source, DSM IV-R, provides descriptions and nomenclature, not etiology. He opined his axis I and axis II diagnoses of borderline intellectual functioning and learning disorder are inextricably linked and cannot be separately evaluated. He opined his neuropsychometric test data is objective evidence of structural abnormalities in Claimant's brain. He opined Claimant has "lesions, . . .actual places in his brain that are damaged."

DISCUSSION AND CONCLUSIONS OF LAW

Causation

68. The parties agreed an accident occurred. Claimant bears the burden of showing the condition for which he seeks benefits was caused by the industrial accident. Neufeld v. Browning Ferris Indus., 109 Idaho 899, 712 P.2d 600 (1985). Here, Claimant had a longstanding history of intermittent back pain with flare-ups, sometimes related to activity, sometimes not. At some point, Claimant herniated a disc. He related the onset of sudden pain to

an incident in which he lifted trusses onto a truck. Claimant showed he suffered an accident, reasonably located as to place, which injured his low back and caused him to require surgery in October 2000.

69. When first reported, Employer recorded the date of the accident as May 29, 2000. Claimant often reported that it occurred later, although his guesses varied among specific Fridays in June, July, and August 2000. Claimant's medical records and testimony demonstrate he is a poor historian. He became confused and defensive on cross-examination. Still, there is no indication that the described accident did not occur. Certainly it did. By limiting his best guesses to certain Fridays in the Summer of 2000, Claimant reasonably located his accident as to time.

70. Although the subject of much discussion at hearing and the source of unusual posthearing activity, the exact date of the accident does not much matter for any issue relevant here. In briefing, the parties appear to have realized the insignificance of a specific accident date and did not depend any argument upon acceptance of a specific accident date. Claimant received chiropractic treatment both immediately before and after late May 2000. He received chiropractic treatment on June 8 and 29, 2000. He began receiving frequent chiropractic treatment beginning July 20, 2000. He continued receiving frequent chiropractic treatment in August 2000. In the absence of an X-ray or other objective diagnostic evidence to specify when the disc herniated, choosing each of the dates yields the same analysis – despite the occasional back pain Claimant suffered before the accident he showed he further suffered a disc injury as a result of the accident.

Apportionment

71. The first step in determining apportionment under Idaho Code § 72-332 requires a

finding that Claimant suffered a permanent disability from the accident. Impairment is a prerequisite to permanent disability. Idaho Workers' Compensation statutes define permanent impairment. Idaho Code §§ 72-422 and 424. The Commission is the ultimate fact finder when deciding impairment. Urry v. Walker & Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989). With a degree of consistency too-seldom seen in a disputed case, all medical providers but one rated PPI for Claimant's low back at or near 12%. The panel doctors recommended apportioning half to preexisting problems. Dr. Moore agreed. Dr. Oliver recommended no apportionment.

72. Dr. Reedy released Claimant to work without restrictions, presumably opining that no permanent impairment existed. However, he later answered written questions by stating he agreed with the restrictions imposed by Dr. Moore.

73. Claimant suffered an injury which required surgery to his low back as a result of the industrial accident. Restrictions were reasonably imposed as a result of the injury and surgery. A 12% PPI rating is not inconsistent with the condition of Claimant's back following the 2000 injury. The Commission finds the opinions of the IME panel and Dr. Moore more persuasive on the issue of apportionment than Dr. Oliver, who only opined that no apportionment was necessary and never offered his own impairment rating. The weight of the medical opinions favors a 50% apportionment for Claimant's preexisting condition. As a result, Claimant suffered 12% whole person PPI of his low back following the 2000 industrial injury, with 50% apportioned to his preexisting low back condition. This injury and surgery constituted the proverbial "last straw," and rendered him totally and permanently disabled.

74. The next step in determining apportionment is to find whether and to what extent Claimant suffered prior permanent physical impairment. In addition to permanent impairment resulting from the injury and surgery, Claimant had previously suffered injuries, some of which

had been rated as permanent impairment by treating physicians at those times. For all rated injuries, Defendants argue essentially that impairment awarded, but not disability awarded, should be dispositive.

75. A prior low back injury had been settled based upon 6% "disability." Medical records demonstrate Claimant suffered permanent impairment as a result of degenerative conditions and injury to his back. For purposes of Idaho Code § 72-332, Claimant previously suffered 6% permanent physical impairment of his low back.

76. Similarly, medical records demonstrate Claimant suffered permanent physical impairment as a result of his right wrist condition. For purposes of Idaho Code § 72-332, Claimant previously suffered permanent physical impairment of 6% as a result of his right wrist condition.

77. Also, medical records demonstrate Claimant suffered permanent physical impairment as a result of his right biceps tendon tear. Dr. Weiss' opinion about Claimant's permanent partial impairment in 1997 carries limited weight. He acknowledged Claimant was not yet stable. He inadequately explained his reasoning for suggesting apportionment of permanent partial impairment to Claimant's preexisting wrist condition. The medical records do not otherwise provide a specific permanent partial impairment rating for the biceps tendon injury. However, Dr. Goodwin did impose restrictions in 1998. In the absence of a persuasive, specific and contemporaneous rating by a physician, and where the agreed-upon rating is consistent with medical evidence of the extent of Claimant's injury, the agreed-upon rating is appropriate for use here. For purposes of Idaho Code § 72-332, Claimant previously suffered permanent physical impairment of 4.4% as a result of his right biceps tendon condition.

78. Defendants argue Claimant should receive a rating for preexisting brain

dysfunction. Defendants rely upon Dr. Beaver's opinions to argue that Claimant's brain dysfunction is a permanent *physical* impairment as required by Idaho Code§ 72-332. However, Dr. Beaver's tests – at most – indirectly suggest Claimant may have suffered some injury to his brain tissue. No X-ray, MRI, PET scan, or similar diagnostic study directly shows damage to Claimant's brain tissue. There is no cyst or tumor. There is no indication that Claimant suffers from a chromosomal abnormality as one would find, for example, in an individual with Down's syndrome. There is no direct evidence of an imbalance of chemicals in Claimant's brain. Absent direct evidence of an injury to Claimant's brain tissue, any suggestion of causation or of a *physical* component to Claimant's learning disability or borderline intellectual functioning is too speculative to be given weight. Surely, every person less intelligent than Einstein should not be considered permanently physically impaired under Idaho Workers' Compensation Law.

79. Idaho's workers' compensation system is a creature of statute. The legislature's use of the word "physical" in Idaho Code § 72-332 precludes an impairment for preexisting mental difficulties absent a physical cause to such difficulties. Defendants failed to show it likely that Claimant suffered a prior brain injury or congenital brain condition which constitutes a permanent physical impairment.

80. The next step of analysis under Idaho Code § 72-332 is to determine whether any or all of these preexisting physical impairments combined with the effects of this accident to render Claimant totally and permanently disabled. The evidence shows Claimant's total and permanent disability did not arise solely from the 2000 accident.

81. Claimant worked at heavy labor with back pain for years before the 2000 accident. At times he sought medical care. At times he changed his job duties. Idaho Code § 72-332 does not require that his prior back pain permanently preclude him from his

job, rather that it hinder his performance. Claimant's preexisting back condition combined with the 2000 accident to render Claimant totally and permanently disabled.

82. Claimant was rated with impairments for his right wrist and biceps tendon. After both injuries, Employer accommodated his return to work and Claimant did not return to making trusses full time. Both conditions combined with the 2000 accident to render Claimant totally and permanently disabled.

83. No other accident, injury, or condition, beyond the aforementioned impairments, has been shown to have combined with the 2000 accident to render Claimant totally and permanently disabled. Thus, Claimant suffered 6% impairment as a result of the 2000 accident, and suffered pre-existing permanent physical impairments totaling 16.4% which combined with the 2000 accident. Employing the Carey formula, permanent disability rated at 27% of the whole person, inclusive of impairment, is apportioned to the 2000 accident [6% ÷ (6% + 6% + 4.4% + 6%) = 27%].

Medical Care

84. An employer is liable for an injured employee's medical care immediately following an industrial injury and for a reasonable time thereafter. Idaho Code § 72-432(1). The record shows that Claimant continues to suffer as a result of a migrating fragment of herniated disc in his low back. This is a direct result of the 2000 accident and surgery. Defendants are liable for all medical care, including future medical care, of Claimant's low back related to the migrating disc material. This includes occasional palliative care.

* * * * *

ORDER

1. Despite the presence of preexisting low back pain, Claimant suffered additional

impairment to his low back as a result of the 2000 accident.

2. As a result of the 2000 accident, Claimant suffered PPI rated at 6% of the whole person.

3. Claimant is totally and permanently disabled. Applying the Carey formula, Defendants Employer and Surety are liable for permanent disability rated at 27% of the whole person, inclusive of PPI.

4. Defendants Employer and Surety are liable for medical care related to Claimant's low back condition, including reasonable palliative care.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __19th_ day of October, 2004.

INDUSTRIAL COMMISSION

_/s/_____
R. D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_Participated but did not sign_____
James F. Kile, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _19th day of October__, 2004, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

Richard S. Owen	Paul S. Penland	Kenneth L. Mallea
P.O. Box 278	P.O. Box 199	P.O. Box 857
Nampa, ID 83653	Boise, ID 83701	Meridian, ID 83680

___/s/_____